

McBRAYER, MCGINNIS, LESLIE & KIRKLAND,<sup>PLLC</sup>  
ATTORNEYS-AT-LAW

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DIANE M. PRITCHARD  
dpritchard@mmlk.com

August 8, 2003

Thomas Dorman, Esq.  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

*Diane M. Pritchard*  
**RECEIVED**

AUG 08 2003

PUBLIC SERVICE  
COMMISSION

**RE: In the Matter of:**  
**Application of Kentucky Power Company d/b/a American Electric Power for**  
**Approval, to the Extent Necessary, to Transfer Functional Control of**  
**Transmission Facilities Located in Kentucky to PJM Interconnection, LLC,**  
**Pursuant to KRS 278.218**  
**Case No. 2002-00475**

Dear Sir or Madam:

Enclosed for filing in the above-referenced matter is an original and eleven (11) copies of the following documents:

1. PJM Interconnection, LLC's Motion to Stay; and
2. PJM Interconnection, LLC's Request for Rehearing.

Please return to me one copy of each pleading bearing the Commission's stamp in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter. Please call if you have any questions.

Sincerely,

*Diane M. Pritchard*

Diane M. Pritchard  
Litigation Assistant

:dmp  
Enclosure

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

**RECEIVED**

AUG 08 2003

PUBLIC SERVICE  
COMMISSION

IN THE MATTER OF: )  
APPLICATION OF KENTUCKY POWER )  
COMPANY D/B/A AMERICAN ELECTRIC )  
POWER FOR APPROVAL, TO THE )  
EXTENT NECESSARY, TO TRANSFER ) CASE NO. 2002-00475  
FUNCTIONAL CONTROL OF )  
TRANSMISSION FACILITIES LOCATED )  
IN KENTUCKY TO PJM INTERCONNECTION, )  
L.L.C. PURSUANT TO KRS 278.218 )

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**PJM INTERCONNECTION, LLC'S MOTION TO STAY**

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Comes PJM Interconnection, LLC, and hereby moves the Kentucky Public Service Commission to enter an Order staying and holding in abeyance all further action in this case based upon the following reasons:

Since the hearing on March 25, 2003, in the above captioned proceeding, two significant events have occurred that raise questions that should be resolved before the Commission renders its final Order in this proceeding. First, on July 31, 2003, the U.S. Senate elected to substitute last years Energy Bill for the bill that was passed in committee this session. There remain marked differences between the Senate and House legislation on RTO issues and, in particular, issues concerning the details of protection of native load customers. Assuming a Conference Report from the Congress in the fall of this year, resolution of this issue by the Congress would help illuminate

issues the Commission was concerned about such as treatment of native load for curtailment purposes.<sup>1</sup>

Secondly, the Commission issued its Order on Rehearing in Case No. 2002-00349, being, *An Investigation Of The Tariff Filing By Kentucky Power Company d/b/a American Electric Power To Implement KRS 278.214*, ordering AEP to make a compliance filing as to whether it complies with KRS 278.214. On July 15, 2003, AEP made its compliance filing under protest, in light of its challenge to KRS 278.214 in federal district court.

Finally, AEP has pledged to provide a Kentucky-specific cost/benefit analysis. As stated in testimony, PJM witness Ott produced a market analysis demonstrating savings to the AEP service territory from its participation in an RTO. That study was not refuted or challenged through testimony or record evidence. That being said, witness Ott made clear that the task of “jurisdictionalizing” that study to Kentucky retail load specifically is a task that only AEP can perform. AEP has pledged to provide such a study on rehearing in this docket.

In light of the Commission’s publicly stated positions in FERC filings, press releases, and participation in the Alliance of State Leaders Protecting Electricity Consumers,<sup>2</sup> PJM requests that the present case be stayed until:

- (1) AEP files its Kentucky specific cost-benefit study;
- (2) the results of pending federal legislation addressing native load obligations are clear;

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<sup>1</sup> In that debate, the issue is not whether RTOs protect native load which PJM agrees they must do. The issue addresses the details of how native load is protected through financial and physical rights in a market-based system.

<sup>2</sup> See, [http://www.protectpowerconsumers.org/index\\_files/page0003.htm](http://www.protectpowerconsumers.org/index_files/page0003.htm)

(3) the Commission has issued its final ruling on Kentucky Power's compliance filing in Case No. 2002-00349, being, *An Investigation Of The Tariff Filing By Kentucky Power Company d/b/a American Electric Power To Implement KRS 278.214*; and,

(4) the associated Federal Court case of AEP regarding its challenge to KRS 278.14 has been resolved provided that can occur in the near future.<sup>3</sup> All of these critical facts will help ensure a complete decision by the Kentucky Commission based on all relevant outside factors while not unduly delaying the proceeding indefinitely.

Until the above-listed issues are resolved, it would be premature for the Kentucky Public Service Commission to issue a final Order in this case which would be subject to an appeal that could likely be unnecessary if the issues listed above are resolved.

WHEREFORE, PJM Interconnection, LLC, respectfully requests the Kentucky Public Service Commission to enter an Order staying this proceeding until the above-listed issues which directly impact this case are resolved.

Respectfully submitted,

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BRENT L. CALDWELL  
ATTORNEY FOR  
PJM INTERCONNECTION, LLC

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<sup>3</sup> *Kentucky Power Company v. Martin J. Huelmann*, Civil Action No. 03-47, U.S. District Court for the Eastern District of Kentucky (filed on July 18, 2003).

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of PJM Interconnection, LLC's Request for Hearing was served this 8th day of August, 2003, as follows:

### **VIA HAND DELIVERY:**

Original and ten (10) copies upon:

Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

### **VIA U.S. MAIL:**

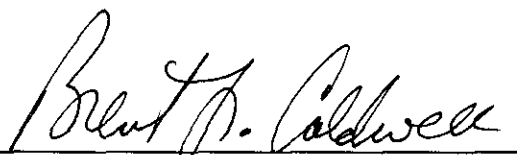
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**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

**AUG 08 2003**

**PUBLIC SERVICE  
COMMISSION**

**IN THE MATTER OF:  
APPLICATION OF KENTUCKY POWER  
COMPANY D/B/A AMERICAN ELECTRIC  
POWER FOR APPROVAL, TO THE  
EXTENT NECESSARY, TO TRANSFER  
FUNCTIONAL CONTROL OF  
TRANSMISSION FACILITIES LOCATED  
IN KENTUCKY TO PJM INTERCONNECTION,  
L.L.C. PURSUANT TO KRS 278.218**

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) **CASE NO. 2002-00475**  
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**PJM INTERCONNECTION, LLC'S REQUEST FOR REHEARING**

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Pursuant to KRS 278.400, PJM Interconnection, LLC (hereinafter "PJM"), requests that the Kentucky Public Service Commission (hereinafter the "Commission") grant rehearing of its July 17, 2003, Order in the above captioned case. In a separate motion filed today, PJM requests that the Commission stay the proceeding until the date that a Kentucky specific cost-benefit study is filed, the results of federal legislation addressing native load obligations are clear, the Commission has issued its final ruling on Kentucky Power's compliance filing in Case No. 2002-00349, being, *An Investigation Of The Tariff Filing By Kentucky Power Company d/b/a American Electric Power To Implement KRS 278.214*, and the associated federal court case has been resolved.<sup>1</sup>

**APPLICATION FOR REHEARING**

As noted in our post hearing brief, the Commission must base its decision on the written record.<sup>2</sup> On appeal the matter "shall be heard and decided by the court upon the

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<sup>1</sup> *Kentucky Power Company v. Martin H. Huelsmann*, U.S. District Court for the Eastern District of Kentucky, Civil Action No. 03-47 (filed on July 18, 2003).

<sup>2</sup> *City of Louisville By and Through Kuster v. Milligan*, Ky., 798 S.W.2d 454 (1990); KRS § 13B.090.

evidence submitted to the Commission as shown by the record, and no other evidence shall be received.”<sup>3</sup> In this case, the Commission found that “[t]he fact that the only testimony presented was from the applicant in support of the proposed transfer does not require the commission to approve the transfer.”<sup>4</sup> The Commission asserts that it may rely on evidence “adduced during discovery and at the hearing, and find it insufficient to meet the applicant’s burden.”<sup>5</sup> Although this may be true, the Commission must as a result base its decision on the answers that PJM’s witnesses and AEP’s witness gave at the hearing since that is the only evidence of record. Moreover, it must base its conclusions on real facts in the record, not mere assertions of counsel or surmises of “possibilities,” without record support, concerning the PJM marketplace. In this case, much of the evidence cited is not of decision-making quality either because it is factually in error based on the evidence of record or draws a conclusion that has no record support. Thus, the Order violates the fundamental requirement that the Commission fully explain its findings and that such findings be well grounded in the record<sup>6</sup>.

Moreover, by the intervenors or staff not submitting any witness or otherwise identifying its key issues up front in any meaningful way, PJM was denied its due process right to cross examine “assertions” that were made through questions presented at the hearing by counsel and subsequently relied upon by the Commission in its decision. Clearly, administrative due process requires that cross-examination be guaranteed<sup>7</sup> in administrative proceedings. Questions and statements of counsel

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<sup>3</sup> *Stephens v. Kentucky Utilities Company*, Ky., 569 S.W.2d 155 (1978).

<sup>4</sup> Order at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *City of Louisville v. McDonald*, Ky., 470 S.W.2d 173, 178 (1971); *Hocker v. Fisher*, Ky., 590 S.W.2d 342 (1979)

<sup>7</sup> *Union Underwear Company, Inc. v. Searce*, 896 S.W.2d 7, 9 (1995).

cannot substitute for record evidence and the lack of factual support for many of the Commission's findings cries out for rehearing where PJM would be able to fairly address the concerns expressed and fairly test the assertions being made through questioning of a live witness. The Commission must make its decision on the record that is before it.

PJM requests rehearing on certain Commission's findings that are factually in error or which relate to issues which the applicants did not have a full and fair opportunity to respond to due to the procedural posture of the case and the lack of any testimony filed putting the parties on fair notice of issues of concern to the parties and the Commission. Specifically PJM seeks rehearing on issues related to the cost-benefit study, compliance with KRS 278.214, generation adequacy, PJM's markets and congestion management, and RTO costs.

#### **A. CURTAILMENTS**

PJM seeks rehearing on the Commission's finding that its enforcement of KRS 278.214 would preclude approval of AEP's proposal to transfer functional control to PJM.<sup>8</sup> In the post-hearing brief,<sup>9</sup> PJM has committed to implement curtailments the same as AEP does today. Moreover, the Commission has yet to rule on AEP's tariff filing in Case No. 2002-00349. As Mr. Hinkel testified at the hearing, PJM will comply with the statute.<sup>10</sup>

Notably, the statute does not address the circumstance wherein shutting off the non-retail, non-coop customer would not "relieve" the emergency. Also notably, the actual curtailment decisions regarding which customers are curtailed are made by the

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<sup>8</sup> Order at 14, 20, and 21.

<sup>9</sup> PJM Brief at 8 and 9.

<sup>10</sup> Tr. 72, 100 and 101



local utility (which remains fully under this Commission's jurisdiction) and not PJM. Under KRS 278.214, PJM and Kentucky Power, consulting together, would determine the nature and extent of the problem. The final decision as to which customer or which type of customer would be curtailed remains, throughout the process, with Kentucky Power operating under its retail tariff provisions concerning curtailment.<sup>11</sup> PJM would consult with Kentucky Power as to the scope of the problem and whether curtailment to a given set of customers (in this case non-coop wholesale customers) would be sufficient to relieve the problem. Under one set of circumstance, i.e., where specific local operational constraints could be alleviated by curtailments, PJM would work with Kentucky Power to ensure that Kentucky Power only curtails the minimum number of customers proximate to the constraint which is necessary to alleviate the problem. In such instance, the statute's prohibitions would be legitimately and fully addressed by PJM in determining the steps needed to "relieve the emergency or other event." Under such circumstances, the statute's requirements would be met as PJM and the company would first seek to determine whether a given curtailment "relieves the emergency or other condition" without interrupting the customer classes identified in the statute as deserving further insulation from curtailments. Under another set of such circumstances, when global adequacy is threatened (and curtailing non-retail, non-coop customers would not relieve the emergency), PJM would, as would AEP, LG&E, Cinergy or any other utility, invoke a broader curtailment protocol as explained by Mr. Hinkel.

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<sup>11</sup> The Commission could be brought into that consultative process if it so wishes through the emergency procedures PJM has already established with its existing state commissions.

In short, PJM would work with Kentucky Power and this Commission to ensure the least amount of curtailment while also honoring the statute's mandates if such curtailment can adequately relieve the emergency.

The details surrounding curtailment decisions are complex and very fact-specific given the particular circumstances at hand. Rather than blanketly concluding that PJM would not meet the statutory requirements, the Commission should use the detailing in this brief and more appropriately a rehearing to work out publicly with PJM protocols and consultations with the Kentucky Commission sufficient for the Commission to satisfy itself that the statute is being honored. PJM would provide such assurances and protocols in detailed written testimony now that this issue has been appropriately brought to light as needing further work through the rehearing process. A handful of questions in discovery and in the hearing did not allow for the kind of detailed, fact-specific development of protocols nor should such protocols simply be developed "on the fly" in response to random cross-examination questions. PJM would welcome such a fair and deliberative process through rehearing. It objects to the bare conclusion that PJM is in violation of the statute without consideration of specific factual circumstances.

In sum, as Mr. Hinkel explained at the hearing,<sup>12</sup> and PJM reiterated in our post-hearing brief, PJM will use its emergency procedures to curtail all interruptible and other users, as required by KRS 278.214, before interrupting Kentucky Power's native load customers in Kentucky Power's certified service territory.<sup>13</sup> Only if that will not relieve the emergency and consistent with the statute, PJM at that point will seek additional curtailments leaving it to Kentucky Power to determine the specific

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<sup>12</sup> Tr. at 75.

<sup>13</sup> PJM's Post Hearing Brief at 8.

customers and type of customers to be curtailed pursuant to its retail tariffs on file with this Commission. Such curtailments could include curtailment to Kentucky Power's Native Load customers, on a pro rata basis.<sup>14</sup> There is no precedent in Kentucky that this violates KRS 278.214. Nor is there any adverse testimony in the record. If the staff and intervenors choose not to sponsor witnesses, then they have to rely on the answers that the opposing witnesses give to their cross. In this case, Mr. Hinkel testified that PJM will comply with KRS 278.214.<sup>15</sup> The Commission's decision on this point is not supported in the record. Therefore, PJM requests rehearing on this critical issue and seeks only a full and fair dialogue and development of protocols on rehearing to ensure that the statute's provisions can be reasonably met.

At that point, PJM will curtail all firm customers, which includes Kentucky Power's Native Load customers, on a pro rata basis.<sup>16</sup> There is no precedent in Kentucky that this violates KRS 278.214, nor is there any adverse testimony in the record. In this case, Mr. Hinkel testified that PJM will comply with KRS 278.214.<sup>17</sup> The Commission's decision on this point is not supported in the record. Therefore, PJM requests rehearing on this critical issue.

## **B. GENERATION ADEQUACY**

PJM seeks rehearing on the Commission's finding that Kentucky customers will have to pay twice for generation adequacy, once through the PJM capacity market and a second time through rates they are charged by AEP.<sup>18</sup> This statement is factually inaccurate and has no basis in the written record. PJM has an installed capacity

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<sup>14</sup> *Id.*

<sup>15</sup> Tr. at 7

<sup>16</sup> *Id.*

<sup>17</sup> Tr. at 7

<sup>18</sup> Order at 15.

requirement that is needed to ensure adequate generation to serve load so as to maintain system reliability. Companies that own their own generation identify their own resources as capacity resources to meet their load. In such instance, they do not pay any additional charge for capacity. By contrast, capacity costs are only incurred by those load serving entities (such as retail marketers in choice states) that do not have sufficient capacity that they own or have a contractual entitlement to cover their load. As this is not at all AEP's situation, the finding that there are two charges is simply erroneous and the Commission's reliance upon it is reversible error. There is no evidence in the record that AEP does not have adequate generation to satisfy its future capacity obligation. Moreover, as a bundled state, Kentucky customers could not possibly be double charged since AEP is the only LSE authorized to provide retail service. Finally, on this issue as with other issues, the issue of PJM's capacity obligations was not raised at the hearing, and no party filed testimony asserting that there would be double recovery. Therefore, PJM requests rehearing on the Commission's finding so that this basis of the Commission's decision process can be corrected.

### **C. PJM MARKETS AND CONGESTION MANAGEMENT**

The Commission's finding that the PJM markets and congestion management will bring no discernible benefit to Kentucky's retail customers is not supported by the record. In fact, the record supports the opposite conclusion. Specifically, Mr. Hinkel testified that the PJM spot markets bring liquidity when AEP has balancing needs.<sup>19</sup> The PJM spot markets also provide a marketplace for AEP to sell its excess generation, which will allow more benefits to flow back to AEP's native load customers than if the

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<sup>19</sup> PJM Brief at 10.

generation remained idle.<sup>20</sup> Mr. Hinkel's prefiled direct testimony puts forth that PJM's spot markets will provide the commission with critical price transparency to benchmark the prudence of AEP's power purchasing decisions.<sup>21</sup> In the order, the Commission ignores this benefit without reference to any comparable or superior tools at the Commission's disposal to assess the prudence of power purchases.

The benefits of LMP are not limited to instances where there is unreliable transmission. Rather, LMP provides appropriate pricing signals that will, among other things, ensure that generation locates in places where it can provide benefit rather than cause congestion on the system. At some point, additional generation, be it merchant generation or regulated generation will seek to be sited in Kentucky. Absent LMP, the citing authorities will have no information on the congestion that such plants could cause from locating at a particular site. This congestion will be borne by Kentucky customers through increased fuel costs to cover the redispatch of units to cure the congestion. Thus, LMP provides an important regulatory tool and its use remained unrefuted on the record.

Moreover, if the Commission is correct that there is no congestion on the Kentucky Power portion of AEP's transmission system, then the absence of LMP on the AEP system represents an increased, not decreased cost for Kentucky Power customers. In the absence of LMP, congestion costs are socialized. In this case given the absence of LMP, the redispatch costs associated with clearing congestion on other parts of the AEP system outside Kentucky are being borne by Kentucky native load customers through their fuel clause payments today since, in the absence of LMP, such

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<sup>20</sup> Id.

<sup>21</sup> Hinkel at 8.

costs are buried and socialized among the entire AEP system. LMP would expose those subsidies and to the extent Kentucky Power has no congestion, it will provide a strong basis for no longer socializing those AEP system costs to Kentucky customers. Thus, the Commission's rationale that there is no congestion on the Kentucky Power system, cuts exactly the other way---the lack of LMP information in such instance harms rather than helps Kentucky Power customers. PJM seeks rehearing from the broad conclusory statement about LMP which lacks any factual support in the record. The unsupported sweeping conclusion is not of decision-making quality given its lack of record support and any witness testimony in support. As a result, the Commission's reliance upon it in this matter provides grounds for rehearing so as to avoid reversible error.

#### **D. PJM's VOLUNTARY MARKETS**

The Commission based part of its decision on a statement that lacks support in the record---namely that PJM could change its market rules to require all generation to be sold into the market.<sup>22</sup> This is a prime example where the Commission substituted unsupported assertions of counsel as to various "possibilities" and simply and unfairly ignored the clear record evidence and the assertions of PJM otherwise.

One of the basic principles of PJM is that the markets are voluntary. PJM's entire market design and its infrastructure are designed to recognize that the spot market is merely a balancing market to be used by a very limited portion of the marketplace. PJM's computer systems are not even capable of handling a mandatory spot market even if PJM concluded, which it would not, that such markets should be mandatory. Moreover, PJM made an affirmative pledge to the Kentucky Commission in its brief that it had no intention of making its market mandatory. These statements were

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<sup>22</sup> Order at 20.

simply ignored by the Commission. The only basis in the record for the Commission's finding is that Mr. Hinkel testified that it was possible.<sup>23</sup> Of course, almost anything is possible and Mr. Hinkel would be untruthful if he did not answer an "is it possible?" question that way. Unfortunately, this "possibility" has become an assertion which the Commission has used to make its decision ignoring the fact that PJM could not, even if it so chose (which it would not), impose such a requirement unilaterally.

The record does not include any evidence that there is any probability that PJM would change its market rules to make the PJM spot markets mandatory. Mr. Hinkel made that clear in his unrefuted testimony. Instead, all evidence in the record supports the finding that PJM's markets are voluntary. If the staff or the Industrials would like to sponsor a witness on rehearing on the probability of PJM market rules being changed to require mandatory sales into the PJM spot markets, PJM would then have had the full and fair opportunity to cross examine these witnesses and find out the basis for their belief. Instead, it was denied that opportunity and bald statements of counsel have been substituted for evidence on this point. For these reasons, PJM requests rehearing on this issue as the evidence simply does not support the Commission's findings at all. The Commission's findings based on these bare assertions of counsel constitute reversible error and a denial of due process. For these reasons, PJM requests rehearing on this finding.

#### **E. RTO COSTS**

PJM requests rehearing on the Commission finding that FERC is not reviewing PJM's RTO costs.<sup>24</sup> PJM recognizes that this issue is very important to the

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<sup>23</sup> Tr. at 124-125.

<sup>24</sup> Order at 17.

Commission. In addition to opening the investigation into LG&E's MISO charges, the Commission has filed SMD comments on point, and is participating in the appeal of FERC's decision in *Midwest ISO Transmission Owners v. Federal Energy Regulatory Comm'n*, Case Nos. 02-1121 and 02-1122 (consolidated) before the U.S. Court of Appeals for the District of Columbia.

PJM recovers its costs through the administrative cost recovery provisions in Schedule 9 of its tariff. PJM has unbundled these costs, so that PJM members only pay for the PJM services they use. Because PJM already has extended its markets and operations to include Allegheny Power, PJM can add AEP to the PJM markets at comparatively little cost. These costs are all subject to FERC review and are certainly open for examination by the Kentucky PSC. No such examination was requested in this case either in discovery or at the hearing.

### **CONCLUSION**

For the reasons stated above, PJM seeks rehearing. PJM seeks only a full and fair opportunity to address the factual misstatements and unsupported surmises that then became the basis for the Commission's decision. Through an appropriately structured rehearing process, the Commission can reach a decision that can withstand judicial scrutiny and demonstrate that it has thoroughly examined all of the issues based on a full and complete record.



Respectfully submitted,

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(859) 231-8780



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BRENT L. CALDWELL  
ATTORNEY FOR  
PJM INTERCONNECTION, LLC

**CERTIFICATE OF SERVICE**

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